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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 864

BEATRICE ANTONETTE TRAMONTANA,

Petitioner,

v.

VARIG AIRLINES,

Respondent.

RESPONDENT'S REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the opinion of counsel for respondent, the only question now presented is whether there are "special and important reasons" for this Court to review a decision of the U. S. Court of Appeals for the District of Columbia applying a Brazilian damage limitation to an action against a Brazilian air carrier for the wrongful death of an American serviceman, domiciled in Maryland and attached to a military unit stationed in the District of Columbia, who was killed in a mid-air collision over Brazil between the U. S. military aircraft he was aboard and a Brazilian commercial airliner on an intranational flight.

STATEMENT OF THE CASE

On February 25, 1960, Vincent Tramontana, an enlisted member of the U. S. Navy Band then on official tour of South America, was killed when a U. S. Navy R6D-1, en route from Argentina to Brazil, upon which he was a passenger collided in the airspace above Rio de Janeiro, Brazil, with a DC-3 owned and operated by respondent's assignor, Real Airlines, on a regular commercial flight from Campos, Brazil, to Rio de Janeiro, Brazil. Tramontana and petitioner were husband and wife living together in Maryland at the time of his death, and petitioner was still residing in Maryland at the time she filed suit against respondent in the U. S. District Court for the District of Columbia for the wrongful death of her husband.

Citing Article 102, Brazilian Code of the Air, which limits liability for physical injury or death arising out of mid-air collisions to a "maximum recovery" of 100,000 cruzeiros (Cr. $100,000) for each person injured or killed, the District Court awarded summary judgment for respondent on October 14, 1963, for so much of petitioner's claim as exceeded the dollar equivalent of Cr. $100,000 on that date. The judgment was affirmed by the U. S. Court of Appeals for the District of Columbia on June 10, 1965, and rehearing *en banc* was denied *en banc* on October 4, 1965.

ARGUMENT

I.

The Law of Conflict of Laws Applicable to Suits in a District of Columbia Forum Is a Matter of "Local" Law To Be Declared by the Highest District of Columbia Court.

Rule 19 of the Rules of this Court provides that judicial review on writ of certiorari will be granted only whe there are "special and important reasons" therefor. And, regardless of the importance of a question to the people of the City of Washington, this Court has traditionally declined discretionary review of cases decided by the U. S. Court of Appeals for the District of Columbia as a matter of local law, *Busby v. Electric Utilities Employees Union*, 323 U.S. 72 (1944), although accepting cases of equal importance with less reservation when that Court purports to declare the law throughout the entire Federal judicial system. See *Miller v. United States*, 375 U.S. 301 (1958). Throughout the proceedings below, petitioner made her supplication to the local law of the District of Columbia, the forum of her choice, to justify a "meaningful" recovery for the death of her decedent, notwithstanding such result would come by way of a conscious disregard of the Brazilian legislation opposed. Against her contention that the law of the District of Columbia alone should measure her damages, the respondent argued below that, should the Court of Appeals ignore the Brazilian damage limitation, it would, in fact, precipitate a question of international conflict-of-laws of a magnitude which could only be resolved by this Court. Petitioner succeeded in persuading the Court of Appeals that the law of conflict-of-laws of the District of Columbia obliged it, if not actually to ignore the *lex loci delicti*, nevertheless to inquire beyond asking merely the site of the injury to find a source of appropriate law. But upon just such an inquiry the Court found the law of the place of injury to

have been the most appropriate all along. The Court of Appeals having ultimately applied District of Columbia law to her disadvantage, therefore, petitioner now argues for the proposition she opposed below, and she says that the measure of damages for the wrongful death of an American national abroad is a matter of general Federal law rather than of concern to the State of his residence or vocation alone.

This Court has frequently said, however, that determination of the appropriate law to control cases having connections with more than one jurisdiction is a question to be resolved by the conflict-of-laws rules of the forum. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Richards v. United States*, 369 U.S. 1 (1962); *Griffin v. McCoach*, 313 U.S. 498 (1941); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 445 (1943); *Van Dusen v. Barrack*, 376 U.S. 612, 637-638 (1964). And the Court of Appeals, declaring the law of conflict-of-laws of the District of Columbia, stated that its decision to apply Brazilian law herein

> ". . . rests upon an examination of the respective relationships of Brazil and the District of Columbia with the accident, and with the parties here involved; and a consideration of their respective interests in the resolution of this issue." (Opinion, p. 7).

A contact-by-contact analysis has been approved in the past by this Court as a proper approach to discover the most appropriate law by which to decide matters extending across territorial boundaries, and nothing in the Court of Appeals' decision departs from the approach which this Court has several times sanctioned. *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1946); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954); *Alaska Packers Assn. v. Industrial Accident Commission*, 294 U.S. 532 (1935). When a forum makes a deliberate choice, upon such an analysis, to apply the *foreign* law, there is even less reason to review its decision than when it re-

jects the foreign law in favor of its own. Cf. *Pearson v. Northeast Airlines, Inc.* (2d Cir. 1962) 309 F.2d 553, *cert. denied*, 372 U.S. 912 (1963).

Moreover, this case concerns a collision between aircraft of different nationalities, and single-aircraft accidents, to which the site of the death in issue may have no more substantial connection than to have had the misfortune to underlie the airspace in which the tragedy occurs, resemble this case only in the circumstance of death occurring in flight. See, e.g., *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961), and *Pearson v. Northeast Airlines, supra*. Admiralty cases involving a collision between vessels of different sovereigns within the territorial waters of one are identical to the case at bar in all respects save the medium in which the collision occurs, however, and, at least since the Chicago Convention of 1944, 61 Stat. 1180, the one has been as subject to the power of the contiguous sovereign as the other. Established principles of admiralty law in such cases hold that the liabilities, including limitations thereof, are governed by the law of the territorial sovereign. *Black Diamond S.S. Corp. v. Stewart & Sons*, 336 U.S. 386, 395-396 (1949); *Smith v. Condry*, 1 How. 28, 33 (1843).

In any case, counsel for respondent are aware of no case, and none is cited by petitioner, in which this Court or any other has held it obligatory upon a U.S. forum to ignore an otherwise appropriate foreign damage limitation because it is the general Federal "public policy" of the United States to guarantee to all U. S. citizens an unlimited monetary recovery for the death of their kin who are killed abroad. The decided authority, in fact, is to the contrary. *Slater v. Mexican National Railroad Co.*, 194 U.S. 120 (1904).

II.

Enforcement of a Brazilian Statute by a District of Columbia Forum To Limit Damages Recoverable for the Death of a Maryland Resident in Brazil Raises No Constitutional Issue.

The balance of petitioner's Brief is devoted to an exposition of the various Constitutional provisions by which, she says, a District of Columbia forum is constrained to ignore the fact that she lives in Maryland if she chooses to sue in the District of Columbia. The Court of Appeals concluded, upon an extended consideration of Maryland law on the subject, that the courts of petitioner's home State would have applied the Brazilian damage limitation, too; it did not, and was not required to, decide whether the result would have been the same had the Tramontanas lived in the District of Columbia. But whether or not the United States Constitution compels courts throughout the Nation to give the citizen of a sister State the benefit of a rule of the forum when the law of his domicile would treat him more harshly, the effect of the Court of Appeals' decision was not to deny petitioner such an advantage merely because she was a "foreigner" before that court. The result below was not predicated upon her Maryland citizenship, but upon Brazil's comparatively greater interest in the amount of her recovery, on the facts of this case, than either Maryland or the District of Columbia. Petitioner has conceded throughout that the facts of the case make it of legitimate governmental concern to all of the jurisdictions involved. The Court of Appeals, therefore, was free to select the law of that jurisdiction to which, in its judgment, the matter was of greatest concern. Compare *Alaska Packers Assn. v. Industrial Accident Commission*, 294 U.S. 532 (1935), with *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).

CONCLUSION

For the foregoing reasons, respondent prays the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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